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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROLAND GONZALES,

Defendant and Appellant.

C085518

(Super. Ct. No. 99F02522)

Defendant Roland Gonzales appeals from a trial court order extending his civil commitment under Penal Code section 1026.5,¹ after being found not guilty by reason of insanity. Defendant contends the trial court erred by failing to obtain a personal waiver of his right to a jury trial in the commitment proceeding. We will reverse the order.

¹ Undesignated statutory references are to the Penal Code.

BACKGROUND

Defendant has a long history of schizophrenia, polysubstance dependence, and antisocial personality disorder. In 1999, defendant was found not guilty by reason of insanity (NGI) of assault with a deadly weapon (§ 245, subd. (a)) and the trial court committed him to a state hospital.² After a 2005 revocation from Conditional Release Program (CONREP), an outpatient treatment program, defendant was returned to Napa State Hospital. The trial court has extended his involuntary commitment multiple times.

At the 2013³ recommitment proceedings, defense counsel advised the court he was waiving defendant's right to a jury trial. There are numerous notations in the clerk's minutes that defendant did not appear in court for good cause, but no indications of discussions of jury trial rights.⁴ Defendant was personally present at the June 2013 recommitment trial. The trial court did not discuss defendant's right to a jury trial. Rather, defense counsel indicated he had been representing defendant since about 2005 and was not "sure [defendant] truly understands, um, that the issue of right to a jury trial and effect of a jury trial. I do not believe that it is, um, in his best interest to proceed to a lengthy trial jury in the matter, which is why I'm electing to proceed, um, with the waiver of the statutory right and proceed with the Court as we are here today." At that time, defense counsel and the district attorney agreed defense counsel had the authority to enter that waiver. The trial court granted the petition extending defendant's commitment.

² The facts underlying defendant's charges are not relevant to any issue on appeal and therefore will not be recounted here.

³ The reporter's transcripts for any proceedings prior to 2013 are not contained in our record on appeal.

⁴ The clerk's transcript minutes do not contain proceedings prior to November 2010 in our record on appeal.

Between July 2014, when the People filed another petition to extend commitment and the May 2015 trial on that petition, there were numerous notations that defendant did not appear at hearings, and the trial court found good cause. Defendant did not personally appear at the May 2015 recommitment proceedings. At that hearing, defense counsel filed an “appearance waiver” signed by defendant. Defense counsel stated defendant’s psychiatrist had previously testified he did not think it was in defendant’s best interest to be physically present at the hearing. The trial court asked counsel if he was “satisfied that [defendant] is aware of what’s going on and aware that he has a right to be here and made a waiver of that right?” Defense counsel stated he was. He reported defendant had repeatedly stated he did not want to come to court, and had asked, “ ‘Can I just sign a power of attorney and then I not have to go to court, and I can go back to the hospital?’ And I explained to him that that was the document that was necessary, but appearance waiver, and I explained it to him, read it to him. He read it and he happily signed it because he did not want to have to come to court.” Counsel then waived defendant’s right to have a jury trial, and stated he had lodged a jury trial waiver with the court. The trial court granted the petition extending defendant’s commitment.

In June 2016, the People filed another petition to extend defendant’s commitment. Defendant was not personally present at the August 2017 hearing on the petition. Defense counsel submitted a signed waiver, in which defendant stated, “I understand that I have the constitutional and statutory right to be present at all court proceedings in my case pending before this court. I further understand that I have legal counsel who can appear on my behalf without me being personally present. By the signature below, I hereby waive my right to be personally present at all proceedings and consent and agree that my legal counsel may appear on my behalf as if I were personally present to include the pending trial before the Superior Court. [¶] Further, I understand that my case is set for jury trial and I knowingly waive my right to have a jury determine the issues before

the court on the pending Petition to Extend Hospital Commitment. [¶] This Waiver of Personal Appearance is valid until expressly waived by me either orally or in writing.” Defense counsel informed the trial court he had discussed defendant’s right to be present at the hearings with him, and defendant had sent numerous letters indicating he did not want to be transported for trial, because he gets harassed by other inmates at the jail. Counsel also indicated defendant understood there was a trial, the nature and consequences of the trial, and his rights. The trial court asked if defendant was waiving his right to a jury trial and counsel answered, “He also understands, and I explained to him that we could do a Court Trial, and he was fully agreeable to that.” The trial court granted the petition extending defendant’s commitment.

DISCUSSION

Defendant contends the trial court erred by failing to advise him personally of his right to a trial by jury and by accepting defense counsel’s waiver of that right in lieu of defendant’s personal waiver. The People contend any error is harmless, as the record shows the waiver was knowing and voluntary. On the record before us, we cannot say the waiver was knowing and voluntary. Accordingly, we must reverse the trial court order extending his civil commitment.

Section 1026.5 provides that in a commitment extension proceeding, “the court shall advise the person named in the petition of the right to be represented by an attorney and of the right to a jury trial.” (§ 1026.5, subd. (b)(3).) “The trial shall be by jury unless waived by both the person and the prosecuting attorney.” (§ 1026.5, subd. (b)(4).)

In August 2015, the Supreme Court examined the standard for a jury waiver under section 1026.5 and held that pursuant to subdivisions (b)(3) and (b)(4): “The trial court must advise the NGI defendant personally of his or her right to a jury trial and, before holding a bench trial, must obtain a personal waiver of that right from the defendant unless the court finds substantial evidence that the defendant lacks the capacity to make a

knowing and voluntary waiver, in which case defense counsel controls the waiver decision.” (*People v. Tran* (2015) 61 Cal.4th 1160, 1163 (*Tran*).)

A trial court’s acceptance of an invalid jury trial waiver requires an automatic reversal, except waiver may be deemed harmless if the record affirmatively shows there was substantial evidence the defendant lacked that capacity at the time of defense counsel’s waiver. Similarly, a trial court’s acceptance of a defendant’s personal waiver without an express advisement of the statutory right to a jury trial may be deemed harmless if the record affirmatively shows, based on the totality of the circumstances, that the defendant’s waiver was knowing and voluntary. (*Tran, supra*, 61 Cal.4th at p. 1170.)

It is undisputed the trial court did not obtain a personal waiver from defendant, the defendant’s waiver must be on the record in a court proceeding. (*Tran, supra*, 61 Cal.4th at p. 1167.) In addition, as in *Tran*, there is no indication in the record the trial court ever advised defendant of his right to a jury trial. The record on appeal shows defendant appeared in court for one hearing in 2013. At that hearing, there was no advisement of rights and no personal waiver. Nor did the trial court find defendant lacked the capacity to make a knowing and voluntary waiver of his right to a jury trial. Such a finding would also need to appear on the record. (*Ibid.*) On the record before us, there is no evidence to support such a finding. Thus, the trial court’s acceptance of the written waiver was an error. (*Id.* at p. 1168.)

Accordingly, we must reverse unless the record affirmatively shows, based on the totality of the circumstances, that defendant’s waiver was knowing and voluntary. This record does not support such a finding. There is no mandate for “any specific method for determining whether a defendant has made a knowing and intelligent waiver of a jury trial in favor of a bench trial. We instead examine the totality of the circumstances.” (*People v. Sivongxxay* (2017) 3 Cal.5th 151, 167; *People v. Farwell* (2018) 5 Cal.5th 295.) The focus of the analysis is not “whether the defendant received express rights

advisements, and expressly waived them, [but] whether the defendant’s admission was intelligent and voluntary because it was given with an understanding of the rights waived.” (*People v. Mosby* (2004) 33 Cal.4th 353, 361.) “ ‘[A] defendant’s prior experience with the criminal justice system’ is . . . ‘relevant to the question of whether he [or she] knowingly waived constitutional rights.’ [Citation.]” (*Ibid.*) We examine the record to determine if the record “*affirmatively shows*” the defendant’s waiver of constitutional rights was voluntary and intelligent. (*People v. Howard* (1992) 1 Cal.4th 1132, 1179, italics added.)

Over the course of years since his initial commitment, there have been numerous recommitment hearings at which defendant was entitled to a jury. Our record on appeal does not indicate the trial court ever advised defendant of his right to a jury trial at those hearings or took a personal waiver from him.⁵ In our record on appeal, the only hearing at which defendant personally appeared was at the 2013 hearing on the petition to extend his commitment. At that time, defense counsel, who had been representing defendant since 2005, indicated he was unsure defendant truly understood the issue of the right to a jury trial. Without any discussion or questioning of defendant, the trial court accepted defense counsel’s waiver of defendant’s jury rights. In 2015, defense counsel filed an “appearance waiver” signed by defendant, indicating defendant had stated he did not want to come to court. Counsel then indicated he was waiving defendant’s right to a jury trial, and had also lodged a jury trial waiver with the court. Neither waiver is contained in our record on appeal. Thus, there is no indication of what information and advisements trial counsel provided to defendant, or what his knowledge and understanding of his rights were. Finally, in the 2017 waiver, defendant waived his right

⁵ As noted above, the first notation in our record on appeal is in the clerk’s transcript and is for November 2010. Defendant was initially committed in 1999 and then returned to Napa State Hospital in 2005.

to personally appear. As to his right to a jury, he stated he understood the matter was set for a jury trial and he “knowingly” waived his right to have a jury. At the hearing, defense counsel stated he had explained to defendant that “we could do a court trial” and defendant agreed to that. Nowhere in either the written waiver or counsel’s statement is there any indication of a discussion with defendant about the nature of the right to a jury trial or the consequences of foregoing this right. A knowing and intelligent waiver requires at least this. (*People v. Sivongxxay, supra*, 3 Cal.5th at p. 171.) This record does not affirmatively demonstrate defendant knowingly and intelligently waived his right to a jury trial. Accordingly, we must reverse the trial court’s order extending his civil commitment.

DISPOSITION

The trial court’s order is reversed.

_____/s/
HOCH, J.

We concur:

_____/s/
BUTZ, Acting P. J.

_____/s/
DUARTE, J.